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No. 00-511

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

FCC, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONSE BRIEF OF WORLDCOM, INC., THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, AND COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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Respondents WorldCom, Inc., The Association for Local Telecommunications and Competitive Telecommunications Association respectfully submit this response to the Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals filed by Verizon Communications Inc. ("Verizon").

As this Court is aware, in 1996 Congress passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151-276 (the "1996 Act"), a landmark statute designed to make local telephone markets competitive "as quickly as possible." H.R. Rep. No. 104-204 at 89 (1995). Responding to Congress's mandate, the Federal Communications Commission ("FCC") issued comprehensive regulations to implement the Act within six months of its passage, releasing an order on August 8, 1996. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 (1996) ("*Local Competition Order*"). Petitions for review of that Order were consolidated in the Eighth Circuit, which stayed, and then vacated, a number of the FCC's regulations, including the FCC's pricing rules, primarily on the ground that the FCC lacked authority to promulgate them. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997). This Court reversed in part, reinstating, among others, the pricing regulations at issue. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

On remand, the Eighth Circuit again invalidated several of the FCC's regulations – including one portion of the FCC's network element pricing rule.[1/] With respect to this pricing rule, the Eighth Circuit found that the term "cost" in

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1/ In particular, the Eighth Circuit invalidated a key portion of the FCC's "TELRIC" rule, which sets rates for network elements at their forward-looking cost. As the FCC explained, forward-looking cost is the most appropriate measure of cost in this context, because forward-looking costs are the only costs relevant in a competitive market. *Local Competition Order* ¶ 675.

§ 252(d)(1) "is ambiguous" and that the FCC therefore had the authority to interpret the term to allow for a forward-looking cost model. Pet. App. 11a. The court further held that the FCC's "use of a forward-looking methodology was reasonable," noting that the FCC had explained "in detail its reasoning." Pet. App. 12a. The court also held that the doctrine of constitutional avoidance did not require the FCC to use a historical cost model, citing well established law that "a takings claim cannot be based on the ratemaking methodology but must be based on the rate itself." Pet. App. 17a.

The Eighth Circuit nevertheless invalidated a key portion of the FCC's TELRIC methodology. The court believed that the language of § 252(d)(1) – which mandates rates based on the "cost . . . of providing the . . . network element" – precluded a forward-looking cost methodology that calculates costs by reference to efficient technology and design choices. Pet. App. 9a-10a. The FCC, WorldCom, Inc., and AT&T Corp. have each filed petitions seeking review of, *inter alia*, the Eighth Circuit's decision invalidating this portion of the FCC's TELRIC pricing rule. *See WorldCom, Inc. v. Verizon Communications, Inc.*, No 00-555 (U.S. filed Oct. 10, 2000); *AT&T Corp. v. Iowa Utilities Board*, No. 00-590 (U.S. filed Oct. 13, 2000); *FCC v. Iowa Utilities Board*, No. 00-587 (U.S. filed Oct. 13, 2000).

Verizon's petition seeks review of a different portion of the Eighth Circuit's decision – that portion concluding that the incumbent LECs have not made out a takings claim. In particular, Verizon asserts that the statutory requirement that rates be based on "cost" must be construed to permit recovery of incumbent local exchange carriers' historical costs in order to avoid takings concerns. As the Eighth Circuit concluded, however, this claim cannot even be assessed because the incumbent LECs have provided absolutely no rate or revenue data. Nor could they. The FCC has expressly left it to the

states to adopt critical inputs – such as depreciation and cost of capital – and to set the actual rates for network elements. Thus, Verizon challenges *only* a rate methodology – a challenge which is squarely foreclosed by a half century of precedent. Moreover, the Just Compensation Clause requires compensation for the *value* of the property taken. TELRIC – which measures what it would cost a firm today to provide the same elements Verizon is producing – calculates precisely that value. TELRIC's "replacement cost" approach to valuation has always been a permissible way of valuing utility property.

That the takings issue is meritless is bolstered by the fact that each of the courts of appeals to have reviewed this issue has reached the same conclusion. *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 407 (5th Cir. 1999) (upholding against takings challenge the FCC's adoption of the TELRIC methodology to implement the Act's requirements with respect to universal service – the policy of assuring affordable quality local telephone service), *cert. granted sub nom, GTE Service Corp. v. FCC*, 120 S. Ct. 2214 (2000), *cert. dismissed*, No. 99-1244, 2000 WL 1641148 (U.S. Nov. 2, 2000). Although this Court granted GTE's petition for review of that decision, GTE voluntarily dismissed that case after opening and opposition briefs were filed. In this petition, Verizon asserts that "This Case Presents Virtually the Same Core Challenges as the Universal Service Case." Pet. at 15. The issues raised by Verizon have no more force here than they did in the case GTE has now abandoned.[2/]

2/ Indeed, this case presents an even poorer vehicle for assessing the constitutionality of rates produced by the TELRIC methodology than did the universal service case. In the universal service context, the FCC applied its methodology to calculate the costs of providing rural service and used those costs to calculate actual federal subsidy amounts that would be paid to Verizon and other carriers.

For all of these reasons, respondents believe there is more than ample basis to deny Verizon's petition. Respondents recognize, however, that the Solicitor General has indicated that he will not oppose Verizon's petition, and believe that it would be inappropriate for a private party to do so in these circumstances. Moreover, it is critical that the process of opening local markets to competition is not delayed further. Over four years after the FCC's rules issued, and almost five years after passage of the Act, the rules under which competition will emerge remain unsettled and competition remains stalled. The Eighth Circuit's invalidation of a portion of the FCC's rules on statutory grounds continues to inject debilitating uncertainty into attempts to open local markets to competition. Verizon's repeated constitutional challenges to those rules – though uniformly unsuccessful – have similarly slowed any meaningful shift to true competition. Accordingly, respondents do not object to review of *all* challenges to the FCC's pricing methodology, so that the validity of that methodology can be fully and finally resolved.

Respectfully submitted,

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